

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Public Employees for Environmental
Responsibility
962 Wayne Ave., Ste. 610
Silver Spring, MD 20910

Plaintiff,

U.S. Fish and Wildlife Service
1849 C St NW, Room 3331
Washington, DC 20240

Defendant.

CIVIL ACTION NO. 19-1325

COMPLAINT

1. Plaintiff Public Employees for Environmental Responsibility (“PEER” or “Plaintiff”) brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, et seq., as amended, to compel the U.S. Fish and Wildlife Service (“USFWS” or “Defendant”) to disclose records wrongfully withheld in failing to respond within the statutory deadline to Plaintiff’s FOIA appeal.

2. Plaintiff is a non-profit organization dedicated to research and public education concerning the activities and operations of federal, state, and local governments.

PARTIES

3. Plaintiff, Public Employees for Environmental Responsibility, is a non-profit public interest organization incorporated in Washington, D.C. and headquartered in Silver Spring, Maryland, with field offices in California, Colorado, Florida, Massachusetts, and Tennessee.

4. Among other public interest projects, PEER engages in advocacy, research, education, and litigation to promote public understanding and debate concerning key current public policy issues. PEER focuses on the environment, including the regulation and

remediation of toxic substances, public lands and natural resource management, public funding of environmental and natural resource agencies, and ethics in government. PEER educates and informs the public through news releases to the media, through its website, www.peer.org, and through publication of the PEER newsletter.

5. Defendant, USFWS, is an agency of the United States as defined by 5 U.S.C. § 552(f)(1).

6. Defendant is charged with the duty to provide public access to records in its possession consistent with the requirements of FOIA. Here, Defendant is denying Plaintiff access to its records in contravention of federal law.

STATEMENT OF FACTS

7. The USFWS manages the National Wildlife Refuge System, with over 400 System units across the country. In 2014 the USFWS adopted a ban, effective Jan. 1, 2015, on the use of any genetically modified crops (GMOs) and any neonicotinoid insecticides in agriculture conducted anywhere in the System via a Refuge System Director's Memorandum titled, "Use of Agricultural Practices in Wildlife Management in the National Wildlife Refuge System" (July 17, 2014).

8. Between 2010 and 2015, PEER had conducted extensive litigation under the National Environmental Policy Act against the USFWS for improperly allowing GMO crops and neonicotinoid insecticides within the National Wildlife Refuge System. That litigation was a major factor in the USFWS's decision in 2014 to adopt its ban.

9. The USFWS then rescinded the ban on GMOs and neonicotinoid insecticides via a Memorandum dated August 2, 2018, from Gregory Sheehan, the Fish and Wildlife Service's Principal Deputy-Director, to Service Directorate, titled: Withdrawal of

Memorandum Titled, “Use of Agricultural Practices in Wildlife Management in the National Wildlife Refuge System”. As a result, PEER determined to file a FOIA request to understand the basis and background for the agency’s rescission of the ban.

10. **Initial Request:** On Aug. 6, 2018, PEER submitted its FOIA request, designated as FWS-2018-01096, which sought the following documents:

Request No. 1: Copies of any and all documents and communications that were used in support of or related to the drafting of the Memorandum dated August 2, 2018, from Gregory Sheehan, the Fish and Wildlife Service’s Principal Deputy-Director, to Service Directorate, titled: Withdrawal of Memorandum Titled, “Use of Agricultural Practices in Wildlife Management in the National Wildlife Refuge System” (July 17, 2014), (copied in full at this link: https://www.peer.org/assets/docs/fws/8_6_18_New_FWS_GMO_memo.pdf).

This request also includes, but is not limited to:

a) Copies of any and all documents and communications that Mr. Sheehan or anyone else connected to the drafting of the Memorandum may have relied on as an example of a specific Refuge or Refuges that are not able to meet “the need to provide adequate forage for waterfowl and migratory birds,” as suggested in the second paragraph of the Memorandum.

b) Copies of any and all documents and communications that Mr. Sheehan or anyone else connected to the drafting of the Memorandum relied on in asserting in the third paragraph of the Memorandum that “there are still instances where a State or regional area does not meet its habitat objectives and the energetic impact of losing private farm land cannot be readily alleviated...under current management practices.”

c) Copies of any and all documents and communications regarding any examples of a specific Refuge or Refuges that Mr. Sheehan or anyone else connected to the drafting relied on in asserting in the fifth paragraph of the Memorandum that: “In some cases the phasing out of those practices [GMO seeds and neonicotinoid insecticides] was appropriate and expedient.”

d) Copies of any and all documents and communications regarding any examples of a specific Refuge or Refuges that Mr. Sheehan or anyone else connected to the drafting may have relied on in asserting in the sixth paragraph of the Memorandum that “use of GMO crop seed is essential to best fulfill the purposes of the refuge and the needs of birds and other wildlife...”

e) Any written description of the criteria to be used by the Service for the “case-by-case basis” decisions described in the eighth paragraph of the Memorandum.

Request No. 2. Since June 1, 2017, to date, copies of any and all documents and communications sent to, from, or within the Department of the Interior and/or U.S. Fish and Wildlife Service Headquarters regarding or related to the letter to Secretary of the Interior Zinke dated September 26, 2017, from the Information Technology & Innovation Foundation (ITIF) of Washington, DC, which proposed that he should allow the planting of genetically modified crops and use of the systemic neonicotinoid insecticides in or on crops within the Refuges (in full at this link: http://www2.itif.org/2017-Interior-letter-GMseeds.pdf?_ga=2.173979427.1872033583.1533573069-2126985309.1533323499).

11. First Response. In a letter dated Nov. 21, 2018, the USFWS partially responded by producing the first batch of records and stating that the agency was withholding a total of 45 pages of records (23 pages in part and 22 in full) pursuant to 5 U.S.C. 522(b)(5), because it claimed they were protected under the “deliberative process privilege”.

12. Second Response. In a letter dated December 18, 2018, the USFWS responded by producing a second batch of records and stating, among other withholdings, that the agency was withholding a total of 278 pages of records (eight pages in part and 270 in full) because it claimed they also were protected under the deliberative process privilege.

13. Third Response and Final Denial. In a letter dated March 7, 2019, the USFWS responded by producing its final batch of records and stating that the agency was withholding an additional 26 pages of records, again claiming they were protected under the deliberative process privilege.

14. PEER’s appeal: On March 18, 2019, PEER timely appealed the USFWS’ partial denial of its FOIA request with respect to the 349 total pages of withheld records, by

emailing a clearly-marked, fully-complete appeal to FOIA.Appeals@sol.doi.gov as follows (in pertinent part):

As explained below, PEER is appealing this denial of all 349 redacted pages in total because CSB's claim fails to meet the criteria for exemptions under 5 U.S.C. § 552(b)(5). FOIA's "Exemption 5," known as the deliberative process privilege, typically exempts from disclosure inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency. In order to assert the deliberative process privilege under Exemption 5, a Federal agency must demonstrate with specificity and detail that the documents that it is seeking to withhold are both pre-decisional and deliberative. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001); Parke, Davis & Co. v. Califano, 623 F.2d 1, 6 (6th Cir. 1980) (in light of the "overwhelming thrust of FOIA... toward complete disclosure," Exemption 5 claims must be supported with specificity and in detail"); see generally Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114, 1117 (9th Cir. 1988).

Here, the FWS responses did not support its redactions and denial of production with the required specificity, detail and reasoning.

The FWS's Denials Constituted Conclusory Assertions as to the Nature of the Requested Presentations.

The FWS failed to explain how Exemption 5 applied to the 349 pages it redacted. The agency just gave a "boilerplate" recitation of the Exemption; that was insufficient. It is evident that many of the redacted documents likely relate to the purely factual request that make up the bulk of PEER's FOIA request. The FWS response letters to PEER's FOIA request did not articulate why the documents that the agency seeks to withhold were pre-decisional and deliberative. CSB did not show – or even hint at – how disclosure would disrupt the deliberative and consultative functions of the agency. Such conclusory statements are not sufficient to exempt CSB from disclosure. Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973). The FWS's failure to provide the requested Vaughn index exacerbated this failure, in violation of FOIA caselaw.

II. The Redacted Pages Likely Include Non-Exempt Factual Information, and FWS Failed to Segregate Them in Accordance with 5 U.S.C. § 552(b).

Provisions 1.a) through 1.d) of the request sought purely fact information that appears not to have been fully provided in the FWS responses, that is:

a) Copies of any and all documents and communications that Mr. Sheehan or anyone else connected to the drafting of the Memorandum may have relied on as an example of a specific Refuge or Refuges that are not able to meet "the need to provide

adequate forage for waterfowl and migratory birds,” as suggested in the second paragraph of the Memorandum.

b) Copies of any and all documents and communications that Mr. Sheehan or anyone else connected to the drafting of the Memorandum relied on in asserting in the third paragraph of the Memorandum that “there are still instances where a State or regional area does not meet its habitat objectives and the energetic impact of losing private farm land cannot be readily alleviated...under current management practices.”

c) Copies of any and all documents and communications regarding any examples of a specific Refuge or Refuges that Mr. Sheehan or anyone else connected to the drafting relied on in asserting in the fifth paragraph of the Memorandum that: “In some cases the phasing out of those practices [GMO seeds and neonicotinoid insecticides] was appropriate and expedient.”

d) Copies of any and all documents and communications regarding any examples of a specific Refuge or Refuges that Mr. Sheehan or anyone else connected to the drafting may have relied on in asserting in the sixth paragraph of the Memorandum that “use of GMO crop seed is essential to best fulfill the purposes of the refuge and the needs of birds and other wildlife...”

5 U.S.C. §522 states that “any reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” However, the FWS has not made any apparent attempt to segregate the non-exempt factual portions of the material responsive to parts a) through d) from the potentially exempt “deliberative” portions in response to PEER’s request. Moreover, “the focus in the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material.” Schiller v. NLRB, 964 F.2d 1205, 1209 (D.C. Cir. 1992) (quoting Mead Data Cent., Inc. v. U.S. Dep’t of Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977)). Thus, Exemption 5 may not protect compilations of factual data or investigative matters that may be reasonably segregated from deliberative material. See Id.; Montrose Chem. Corp., 491 F.2d at 68.

The requested materials largely relate to fact questions; such materials are not protected from disclosure by Exemption 5 unless they “reveal the deliberative process” or are “inextricably intertwined” with policy-making. Ryan v. Dep’t of Justice, 617 F.2d 781, 790 (D.C. Cir. 1980). The requested fact disclosures must be segregated from any properly exempted “decisional” information and disclosed pursuant to PEER’s request.

III. The FWS’s Partial Disclosures are Inconsistent with the Purpose of FOIA

Disclosing some, but not all, of the documents underlying the FWS decision amounts to cherry-picking favorable materials to be made public, a direct contradiction of the purpose of FOIA. Army Times Publishing Co. v. Dep't of Air Force, 998 F.2d 1067 (D.C. Cir. 1993) (“FOIA operates on the premise that government will function best if its warts as well as its wonders are available for public review.”)

The inescapable conclusion from the almost 350 pages of redactions is that the FWS’s actual concern is to avoid public embarrassment of agency leaders, and public examination of how its decision was influenced by outside organizations -- and likely by Department of the Interior political appointees with conflicts of interest in the outcome of the decision.

FOIA’s basic purpose is “to ensure an informed citizenry,” and the information required by this purpose is not limited to what is flattering to an agency. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (emphasis added). To honor this purpose, FWS must disclose all nonexempt responses.

Conclusion

The FWS’s claim that the 349 pages of materials that PEER requested were all exempt from release fell short of meeting the requirements for deliberate process privilege exemptions under 5 U.S.C. § 552(b)(5). Consequently, the partial denials of PEER’s FOIA request for those pages were unjustified and should be reversed.

15. When PEER emailed its appeal to the Office of the Solicitor it requested an email delivery confirmation, which PEER received immediately after filing. Since filing the appeal more than 20 working days has passed with no acknowledgment of the appeal and no decision.

16. After the expiration of the 20 working day period, on April 22 PEER followed up via emails to the Office of the Solicitor and USFWS’s FOIA officer seeking a resolution of its appeal. However, PEER has received no response to date. The USFWS has utterly ignored PEER’s appeal. That has forced this litigation.

COUNT I:
(Violation of FOIA, 5 U.S.C. § 552)

17. Plaintiff incorporates and restates the allegations of the preceding paragraphs as though fully set forth herein.

18. Plaintiff properly requested records that on information and belief are currently within the possession, custody, and control of Defendant.

19. Defendant is violating FOIA by failing and/or refusing to produce 349 total pages of withheld non-exempt records responsive to Plaintiff's request.

20. Plaintiff is being irreparably harmed by Defendant's violations of FOIA, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to comply with FOIA by producing the 349 pages of withheld records in full.

21. The FOIA requires agencies to make a determination on a FOIA appeal within 20 working days after its receipt. 5 U.S.C. § 552(a)(6)(A)(ii). Agencies may extend this 20-day time period only upon written notice of "unusual circumstances," and then for no longer than ten days. 5 U.S.C. § 552(a)(6)(B).

22. Department of the Interior regulations implementing FOIA elaborate that: "(a) The basic time limit for responding to an appeal is 20 workdays after receipt of an appeal meeting the requirements of §2.59 of this subpart. (b) If the Department is unable to reach a decision on your appeal within the given time limit for response, the appropriate deciding official for FOIA appeals will notify you of your statutory right to seek review in a United States District Court." 43 CFR §2.62.

23. Plaintiff constructively exhausted its administrative remedies when USFWS failed to make any determination or provide any response whatsoever with respect to PEER's administrative appeal by April 16, 2019, or within 20 "workdays" of its receipt and

acknowledgment on March 18, 2019, and now seeks an order from this Court requiring Defendant to immediately produce all of the records sought in Plaintiff's FOIA request and Plaintiff's appeal in full, as well as other appropriate relief, including attorneys' fees and costs.

JURISDICTION AND VENUE

24. Plaintiff incorporates and restates the allegations of the preceding paragraphs as though fully set forth herein.

25. This Court has jurisdiction over this action under 5 U.S.C. § 552(a)(4)(B). This Court also has federal question jurisdiction over this action under 28 U.S.C. § 1331.

26. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*

27. This Court is a proper venue because Defendant is a government agency that resides in the District of Columbia. *See* 28 U.S.C. § 1391(e)(1)(A) (where defendant is the government or a government agency, a civil action may be brought in the district where the defendant resides). Venue is also proper under 5 U.S.C. § 552(a)(4)(B) (providing for venue in FOIA cases where the plaintiff resides, where the records are located, or in the District of Columbia).

28. This Court has the authority to award reasonable costs and attorneys' fees under 5 U.S.C. § 552(a)(4)(E).

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Enter an order declaring that Defendant wrongfully withheld the requested agency records;

2. Issue a permanent injunction directing Defendant to disclose to Plaintiff all of the 349 pages of withheld records in full;
3. Maintain jurisdiction over this action until Defendant is in compliance with the FOIA and every order of this Court;
4. Award Plaintiff attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E); and
5. Grant such additional and further relief to which Plaintiff may be entitled.

Respectfully submitted on May 2, 2019,

/s/ Peter T. Jenkins
Peter T. Jenkins, Senior Counsel, DC Bar # 477229
Public Employees for Environmental Responsibility
962 Wayne Ave, Suite 610
Silver Spring, MD 20910
(202) 265-4189
pjenkins@peer.org

Counsel for Plaintiff